IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROSE ANN WILSON HUNTER SHANKS, PLAINTIFFS,

VERSUS CIVIL ACTION NO.: 1:95CV214-S-D

TUNICA COUNTY, GREG HURLEY, and
JIM MERIWETHER, individually, and in
their official capacities, DEFENDANTS.

MEMORANDUM PARTIALLY GRANTING
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This cause of action is before the court on the motion of the defendants for summary judgment. First, the plaintiff alleged that she was discharged because of her age in violation of the Age Discrimination in Employment Act (ADEA); second, that she was discharged in retaliation for a statement she made concerning Jim Meriwether in violation of her First Amendment to free speech; and finally, that she was denied Due Process when she was not given a hearing. The plaintiff has confessed that she does not have an ADEA claim.

Summary Judgment Standard

On a motion for summary judgment, the court must ascertain whether there is a genuine issue of material fact. Fed. R. Civ. P. 56(c). This requires the court to evaluate "whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The United States Supreme Court has stated that "this standard mirrors the standard for a directed verdict...which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." Anderson, 477 U.S. at 250-51 (citation omitted). Further, the Court has noted that the "genuine issue" summary judgment

standard is very similar to the "reasonable jury" directed verdict standard, the primary difference between the two being procedural, not substantive. Id. at 251. "In essence...the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52. "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict - `whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'" Id. at 252 (citation omitted). However, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." Id. at 255.

Facts

The plaintiff began working as an Emergency Medical Technician (EMT) for Tunica County, Mississippi, on January 2, 1991. On January 3, 1994, Defendant Meriwether was hired to serve as the Administrative Supervisor of the Tunica County Ambulance Service, with his primary duty being to upgrade the ambulance service from a basic service to an advanced life-support service. Prior to being hired, Meriwether rode as an observer on several emergency calls. On one of these calls, he attempted to give medical assistance to a patient, but was stopped by the plaintiff because Meriwether was not certified in the State of Mississippi. The plaintiff spoke with Greg Hurley, the assistant County Administrator, about the incident. Meriwether applied for certification with the Mississippi State Department of Health, Emergency Medical Services Division as an EMT-Basic the same day he started work. Meriwether received his certificate on January 5, 1994.

The employees of the Tunica County Ambulance Service submitted the Board of Supervisors a multi-page list of complaints pertaining to Meriwether. It is evident from the list of complaints that the plaintiff's fellow employees felt that she was a target of unnecessary harassment from Meriwether. Tunica County had received several complaints concerning the plaintiff's care of patients. Prior to Meriwether becoming administrator, no complaints had been lodged against the plaintiff. The plaintiff asserts that most of the complaints were solicited by Meriwether and that she was actually discharged in retaliation for speaking out against Meriwether's insufficient qualifications and his job performance. The plaintiff was terminated on April 20, 1994. The defendants allege that the plaintiff was discharged because of the complaints. I. Due Process Violation

"[A] governmental employee's interest in his continued employment is a 'property interest entitling him to claim federal due process protection if there are rules or mutually explicit understandings that afford to an employee a reasonable expectation to security interest in his job.'" Shawgo v. Spradlin, 701 F.2d 470, 474 (5th Cir. 1983) (quoting Bishop v. Wood, 426 U.S. 341, 346 n. 8 (1974)). "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." Board of Regents v. Roth, 408 U.S. 564, 576 (1972). The underlying conception of a property interest is "to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Roth, 408 U.S. at 577.

> To have a property interest in a benefit, a person clearly must have more that an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily

> undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

Id. 408 U.S. at 577. The United States Constitution is not the source of property interests, but only protects them from obtrusive government action. Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985). "Once bestowed, property interests may not be extinguished by the state without adherence to minimal due process standards." McMurtray v. Holladay, 11 F.3d 499, 503 (5th Cir. 1993) (citing Boucvalt v. Board of Comm'rs, 798 F.2d 722, 728 (5th Cir. 1986)).

In the absence of an employment contract or when an employment contract fails to specify a definite term of employment, the relationship between the employees and their employer may be terminated at the will of either party. See Perry v. Sears, Roebuck & Co., 508 So. 2d 1086, 1088 (Miss. 1987). Mississippi has followed this rule since 1858. See Butler v. Smith & Tharpe, 35 Miss. (6 Geo.) 457, 464 (1858). The Mississippi Supreme Court explained the employment at will doctrine as follows:

> The employee can quit at will; the employer can terminate at will. This means that either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract.

Kelly v. Mississippi Valley Gas Co., 397 So.2d 874, 874-75 (Miss. 1981); but see Shaw v. Burchfield, 481 So.2d 247, 253-54 (Miss. 1985) ("Were this a case where no employment contract established expressly the ground rules for termination and where the employer was calling upon the state to furnish the law which authorized termination, we might well be charged to reconsider the at will termination rule."); Perry v. Sears, Roebuck & Co., 508 So.2d 1086,

1087 (Miss. 1987) ("This is not the first time we have taken note of corporate callousness towards loyal workers"); Bobbitt v. The Orchard, Ltd., 603 So.2d 356, 361 (Miss. 1992). The first inquiry in any due process claim is whether the claimant has suffered a deprivation of a protected interest: life, liberty or property. The immediate question is whether the plaintiff had a property interest in her continued employment with the Tunica County Ambulance Service. If the plaintiff enjoyed a property interest in her employment with the Tunica County Ambulance Service, her job could not be terminated without "due process" of the law. See Bishop v. Wood, 426 U.S. 341 (1976).

The Tunica County Personnel Plan provides:

> Performance Examinations
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> In all positions, the employee shall be subject to a six (6) month conditional employment period, in which his/her ability to perform the duties and responsibilities of the job will be determined and evaluated. At the end of the six (6) month period, the conditional employee will be granted permanent status or terminated for just cause.

A permanent employee is defined as: "An employee who has successfully completed his probationary period as specified upon original appointment." The court finds that a reasonable person would rely upon these provisions as establishing a continuance of employment absent cause for dismissal. See Roth, 408 U.S. at 566 (noting that contract providing for continued employment "during efficiency and good behavior" creates a property interest); Russell v. Harrison, 736 F.2d 283, 287 (5th Cir. 1984) (holding that contract providing the poser to terminate employment "for malfeasance, inefficiency or contumacious conduct" by the employee created a property interest); Sartin v. City of Columbus Utilities Commission, 421 F. Supp. 393,

397-98 (N.D. Miss. 1976) (holding Mississippi statute and city ordinance providing employer the right to discharge employees "found inefficient or for other good cause" creates a property interest). Additionally, the Personnel Plan contains a list of "reasons for disciplinary action," and a procedure for dismissal.

> 2. Forms of Disciplinary Action.
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> (b) Dismissal. An employee may be dismissed by his Department Head with the prior approval of the Board of Supervisors for appropriate reasons. The employee shall be furnished an advance written notice containing the nature of the proposed action, the charges against him, and his right to answer the charges in writing. After receiving notice, but prior to the proposed effective date of dismissal, the employee may be retained in a duty status, placed on vacation leave, (if he has any to his credit), leave without pay, or suspended without pay at the discretion of the Department Head and Board of Supervisors.

There is a question of fact whether this procedure was followed when the plaintiff was discharged.

II. Retaliatory Discharge

The test for retaliatory discharge of a public employee for exercising First Amendment rights is well settled:

> In order to establish a constitutional violation [the plaintiff] must first prove that her speech involved a matter of public concern. Connick v. Myers, 461 U.S. 138, 147 (1983). Second, she must demonstrate that her interest in "commenting upon matters of public concern" is greater than the defendants' interest in "promoting the efficiency of the public services [they] perform." Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Third, she must show that her speech motivated the defendants' decision to fire her. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977).

Thompson v. City of Starkville, Miss., 901 F.2d 456, 460 (5th Cir. 1990) (quoting Frazier v. King, 873 F.2d 820, 825 (5th Cir.), cert. denied sub nom., Davoli v. Frazier, 493 U.S. 977

(1989)).

Connected to the exercise of her First Amendment rights, the plaintiff "must initially establish that his speech addressed a matter of public concern." Brawner v. City of Richardson, Tex., 855 F.2d 187, 191 (5th Cir. 1988) (citation omitted). "If the speech did not address a matter of public concern, then the employee is not entitled to constitutional protection against discharge, even if he was fired for what he said." Id. (citing Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021, 1023 (5th Cir. 1988)).

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick v. Myers, 461 U.S. 138, 147 (1983). Issues rise to the level of public concern if an individual speaks primarily in his role as a citizen rather than as an employee, or if the information conveyed is of "relevance to the public's evaluation of the performance of governmental agencies." Day v. South Park Indep. School Dist., 768 F.2d 696, 700 (5th Cir. 1985); see also Coughlin v. Lee, 946 F.2d 1152, 1157 (5th Cir. 1991); Thompson v. City of Starkville, 901 F.2d 456, 461 (5th Cir. 1990). The plaintiff simply informed Greg Hurley of the incident when Meriwether attempted to administer medical attention when he was only riding as an observer. At the time the plaintiff reported Meriwether, it had not been announced that he would be the administrator of the ambulance service. The court believes that it is a matter of public importance that EMTs be properly licensed to practice in the state of Mississippi, no matter how perfunctory it may be to get a license.

The next question is whether the state's interest in efficient management of its operations

outweighs the employee's interest in commenting upon matters of public concern. See Connick, 461 U.S. at 142. This involves whether the speech:

> (1) was likely to generate controversy and disruption, (2) impeded the department's general performance and operation, and (3) affected working relationships necessary to the department's proper functioning.

Pickering v. Board of Education, 391 U.S. 563, 569-73 (1968). Since an employee's First Amendment rights are balanced with the efficiency of the work environment on a case-by-case basis, there is an implied justification for finding the existence of qualified immunity. "There will rarely be a basis for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." Noyola v. Texas Dept. of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988). The plaintiff simply reported to her superiors the incident with Meriwether which could have exposed Tunica County to a great deal of liability. The court finds the plaintiff's actions do not fail this second prong.

> The final hurtle in deciphering a First Amendment claim is the question of causation.
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> Only if the court finds that the employee's First Amendment rights outweigh the government's interest in the effective provision of public services does the fact-finder proceed to consider the separate issue of causation.

Coughlin v. Lee, 946 F.2d at 1157. The United States Supreme Court held in Mt. Healthy City Sch. Dist Bd. of Educ. V. Doyle, 429 U.S. 274, 287 (1977), that the employee must demonstrate that his protected conduct was a substantial motivating factor in his desperate treatment. At this stage, the plaintiff has at least established a genuine issue of fact whether her statement about Meriwether was a substantial factor in her subsequent discharge.

An order in accordance with this memorandum opinion shall be issued.

This the _____ day of June, 1996.

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CHIEF JUDGE